IN THE HIGH COURT OF BOMBAY AT PANAJI

CRIMINAL REVISION APPLICATION NO. 21 OF 2005

1. M/s. Cabral & Co.,
   sole Proprietary concern
   of Shri Francis Simon Cabral,
   having office at First Floor,
   Tilak Commercial Complex,
   F. L. Gomes road,
   Vasco da Gama, Goa 403 902.

2. Shri Francise Simon Cabral,
   sole Proprietor of M/s. Cabral & Co.,
   having office at First Floor,
   Tilak Commercial Complex,
   F. L. Gomes road,
   Vascao da Gama, Goa 403 902.
   (Registered addresses) ..... Petitioners

V e r s u s

1. Shri William Rosario Fernandes,
   Major in age, resident of
   House No.133/1, 2nd ward,
   Colva, Salcete, Goa.

2. The State of Goa,
   through Public Prosecutor. ..... Respondents

Mr. P. A. Kholkar, Advocate for the Petitioners/accused.

Mr. S. Usgaonkar, Advocate for Respondent no.1/Complainant.

CORAM: **N. A. BRITTO, J.**

DATE: **7th September, 2006.**

ORAL JUDGMENT

This revision is by the accused who has been convicted under Section 138 of the Negotiable Instruments Act, 1881, ('*Act*' for short), by the learned J.M.F.C., Margao, and whose conviction and sentence have been confirmed by the learned Additional Sessions Judge, Margao.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the complaint.

3. The undisputed facts of the case are that there were two agreements between the parties. The first was an agreement dated 30.12.1999, which was styled as an Agreement of Sale and which in fact was entered into between M/s. William's Beach Retreat Private Ltd., of which the Complainant was a Managing Director and the accused along with his wife Smt. Ena Ivy Cabral. By the said agreement, the accused and his wife had agreed to purchase a hotel complex known as William Resorts

for a sum of Rs. 3,30,00,000/-, out of which, Rs. 25,00,000/- were paid and the balance was payable as per the mode of payment indicated in Para 4 of the said agreement. However, it appears that the said balance of Rs.57,67,873/-, was not paid as contemplated by the end of January, 2001, as a result of which another agreement dated 01.10.2001 was entered into between the Complainant and the accused and this agreement was styled as Agreement of Settlement of Accounts. As per this agreement, seven cheques were issued by the accused to the Complainant with dates mentioned thereon and there is no dispute that the first five cheques were honoured by the accused.

4. The cheque no. 156749 dated 15.02.2002 and cheque no. 082601 dated 15.03.2002, became the bone contention between the parties. The subject matter of the complaint from which the present revision arises is the cheque no. 156749 dated 15.02.2002. The subject matter of cheque no. 082601 dated 15.03.2002, was another complaint filed by the Complainant which ended in acquittal by Order dated 31.03.2005 of the learned C.J.M. and the same is assailed by the Complainant in Criminal Appeal no.22/2005, which will be disposed of separately, as requested on behalf of the Complainant.

5. Both the parties ought to have ensured that the two complaints were tried by one and the same Court. However, that did not happen and as already stated, the complaint in relation to cheque no. 156749 dated 15.02.2002 ended in conviction while the complaint in relation to cheque no. 82601 dated 15.03.2002 ended in acquittal. Note also is required to be made of the fact that the Complainant had prosecuted only one accused namely Francis S. Cabral as the proprietor of Cabral & Company. Cabral & Company, which was a proprietorship concern of the said Francis S. Cabral, had no independent legal entity and, therefore, could not have been prosecuted separately and this position ought to have been taken note of by one or the other Court, below. There is also no dispute that after filing the complaint, the accused during the pendency of the complaint on or about 11.06.2003, deposited a demand draft in the sum of Rs.2,50,000/- drawn in favour of the Complainant which the Complainant accepted without prejudice to his claim. In other words, as on 12.06.03, the amount due by the accused to the Complainant on the said cheque stood paid.

6. The case of the Complainant, in brief, was that the accused as the proprietor of the said concern had issued cheque no. 156749 dated 15.02.2002 for Rs.2,50,000/- drawn on Goa State Co-operative Bank

Limited, Nagoa-Verna Branch, and which cheque when presented by the Complainant with his Bank namely Federal Bank Limited, Margao, was returned dishonoured by memo dated 19.02.2002 for insufficient funds which the Complainant came to know on 20.02.2002, whereupon the Complainant through his Advocate served the statutory notice upon the accused dated 26.02.2002, which the accused received on 02.03.2002 and which the accused failed and neglected to comply and thereby committed an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The complaint was filed on 05.04.2002.

7. The Complainant has examined himself and the Manager of the Goa State Co-operative Bank, in support of his case. The Manager stated that the cheque which was presented by the Complainant for payment, was returned for insufficient funds and produced the necessary documents. The accused did not step in the witness box but examined his Accounts Manager, namely Conceicao Menezes. The accused when was examined under Section 313 of the Code of Criminal Procedure, 1973, admitted that he had issued the said cheque and stated that there was no liability on his part. The accused also admitted that the cheque was dishonoured on account of insufficient funds but added that he had deposited the cheque

amount in the Court. The accused further stated that the cheque amount of Rs. 2,50,000/- was not due to the Complainant because the Complainant had given a letter to him to pay the Complainant's pending bills which he had paid.

8. Admittedly, the accused did not comply with the statutory notice as stipulated by 17.03.02. Further dispute between the parties started after 15.04.2002. On this day, the Complainant handed over to the accused a letter written by him which reads as follows :-

> "Sir,
>
> I hereby authorise you to make the following payments and deduct amounts due by you to me against Hotel Account.
>
> | | | |
> |---|---|---|
> | Sales Tax 1999-2000 | | Rs. 36,602.00 |
> | Luxury Tax 1999-2000 | | Rs. 23,749.00 |
> | Employees: | | |
> | Anand Patekar - | Rs. 18,000.00 | |
> | Augustine Fernandes | Rs. 27,000.00 | |
> | Frank Fernandes | Rs. 16,000.00 | Rs. 61,000.00 |
> | | | Rs. 121,351.00" |

9. After the said letter was written by the Complainant to the

accused dated 15.04.2002, the accused wrote a letter to the Complainant dated 19.04.2002. This letter was written apparently as an answer to the statutory notice/s sent by the Complainant to the accused. By this letter sent on behalf of the accused, the accused stated that the amounts due and under the said cheques were not entirely due and payable to the Complainant and, therefore, the Complainant was not liable to be punished under Section 138 of the Act. On behalf of the accused, it was further stated that the Complainant had come to the office of the accused and given a written authorization to make the deduction in the amount of Rs.1,21,351/- vide said letter dated 15.04.2002. On behalf of the accused, it was also stated, without prejudice to the rights of the accused, that the accused was willing to pay a sum of Rs.3,78,649/-, after deducting the amount of Rs.1,21,351/- and certain further conditions were imposed in that the Complainant was required to return the dishonoured cheques in his possession, the Complainant was required to give no objection letter to the accused for obtaining an extension for OTS from EDC, etc. The said letter written on behalf of the accused dated 19.04.2002 was followed by letter dated 30.04.2002, written on behalf of the Complainant. By this letter, it was stated on behalf of the Complainant, that on 15.04.2002, the accused had phoned the Complainant and requested him to come to the hotel to

collect the cheques by way of Pay Order of the Bank as the accused wanted to close the issue to avoid filing of a criminal case. It was also stated, on behalf of the Complainant, that the Complainant had attended the office of the accused believing that the entire amount would be paid and as the Complainant was in urgent need of funds which had to be paid to the third parties one of whom had already filed a criminal case under Section 138 of the Act, against the Complainant. It was also stated, on behalf of the Complainant, that since the Complainant was in utter need of funds, to get out of the said criminal case, the Complainant had filed the said letter against his wish under the belief that the Complainant would get the Pay Order immediately with the balance amount and the complainant would clear Mr. Raikar, who had filed a case against him. It was also stated that on signing the said letter by the Complainant, the accused had snatched the said letter from the hands of the Complainant and had kept in the drawer of the accused stating that the accused would send the Pay Order in the evening as it was lying with the cashier. By this letter and without prejudice to what the Complainant had stated in the said letter, the Complainant withdrew the said letter dated 15.04.2002 of the Complainant and further the Complainant called upon the accused to pay the full amount within two days, failing which, the Complainant stated that the agreement with the

accused would stand terminated and the Complainant would take all legal measures to take over the management of M/s. William's Beach Retreat Private Ltd., forfeiting all the amounts paid either to the Complainant or to the EDC, etc. Presumably, in compliance to the said letter dated 30.04.2002 of the Complainant, the accused by letter dated 04.05.2002, sent a demand draft dated 04.05.2002 of Rs. 5,00,000/- by way of full and final settlement payable to the Complainant under the Agreement dated 01.10.2005. At the same time, on behalf of the accused, the Complainant was called upon to send a duly stamped receipt for the said amount of Rs.5,00,000/-, a letter acknowledging that all amounts payable under both the aforesaid agreements, were paid and to return the said two dishonoured cheques. The Complainant instead of accepting the said demand draft, sent by the accused by letter dated 04.05.2002, by his letter dated 11.05.2002, returned the said draft as it was not received within two days as earlier stipulated by the Complainant and as it was received on 07.05.2002 instead of 06.05.2002. The Complainant also stated that since the stipulations in the letter dated 30.04.2002 were not complied by the accused, the contracts between the accused and the Complainant, stood terminated at the end of 06.05.2002. On behalf of the accused, letter dated 14.05.2002 was sent to the Complainant. In this letter, on behalf of the accused, it was stated that

04.05.2002 was a Saturday, which is a half working day for the Banks, and on that day, postal service by registered mail was closed and that the accused posted the letter with the demand draft on 06.05.02 and it was immaterial when the Complainant received the same. On behalf of the accused, it was also stated that the short grace time of two days was indeed a mockery of conscience. The accused also requested the Complainant to accept the said amount of Rs.5,00,000/- in full and final settlement of the Complainant's claim and to return the cheques in possession of the Complainant and to sign all papers. On behalf of the accused, it was also stated that in case the acceptance did not come within the period of seven days, then the accused would be constrained to revive his case of Rs.1,21,351/- and take further legal action against the Complainant to compel the Complainant to fulfill all the obligations under the Contract as well as to recover the loss suffered by the accused on account of the breach of the Contract on the part of the Complainant.

10. The learned J.M.F.C. after considering the evidence led by the Complainant as well as on behalf of the accused and referring to the letter dated 15.04.2002, observed that there was nothing on record to show that the accused was authorized by the Complainant to deduct the alleged

amount of Rs.1,21,351/- and further observed that assuming that the said letter was given by the Complainant i.e. it was subsequent to the presentation of the cheque of payment. The learned J.M.F.C., held that even if the sum of Rs. 1,21,351/- was to be deducted from the sum of Rs.5,00,000/- due to the Complainant, the accused was liable to pay to the Complainant as on 15.04.2002, as per his own admission, an amount of Rs. 3,78,469/-, which ought to have been the figure for which the purported cheque bearing no. 902119, was drawn by the accused, but the counterfoil shown by D.w.1/Conceicao Menezes was only for Rs.1,58,649/-, which showed that the said cheque was not drawn in favour of the Complainant. In other words, the learned J.M.F.C. did not accept the evidence of D.w.1/Conceicao Menezes that the accused had made any attempt to pay the balance amount to the Complainant in the sum of Rs.3,78,469/- after the Complainant had given the said letter dated 15.04.2002, requesting the Complainant to deduct the said amount against the hotel account. The learned J.M.F.C. also took note of the fact that the cheque was returned dishonoured for insufficient funds, a fact, which was admitted by the accused, and in case it was decided that the payment should be withheld by the accused for whatever reason, the accused would have instructed the Bank to stop the payment and it would not have been a case of insufficient

funds in the accounts of the accused.

11. The learned J.M.F.C. took note that the payment was made by the accused subsequently by demand draft, which was refused by the Complainant and further considering that the amount was already paid in Court and accepted by the Complainant, proceeded to convict and sentence the accused only to pay a fine of Rs.5,000/- in default to undergo imprisonment for three months.

12. The learned Additional Sessions Judge took note of the second agreement between the parties and observed that there was absolutely no liability of any payment of money placed on the Complainant and the liabilities were settled by issuing cheques by the accused. Referring to the letter of the Complainant dated 15.04.2002, the learned Additional Sessions Judge, observed that the said letter could be taken by way of settlement waiving off some rights of the Complainant and such a letter could not prove that the amount of the cheque was not legally enforceable debt or liability and that as far as the second agreement, the cheque amount was legally enforceable debt. It was also noted by him that the said letter could be seen as a gesture for settling the entire dispute by waiving some rights

and it could not come in the way of legal claim of dues by way of cheques issued under the said second agreement and based on the said letter, the accused could not be held to have proved that there was no debt or liability.

13. Shri Kholkar, the learned Counsel on behalf of the accused submits that because the accused had paid an amount of Rs. 1,21,351/- at the request of the Complainant contained in the said letter dated 15.04.2002, there was no legally enforceable debt which the accused was required to pay to the Complainant, and therefore, was not liable to pay the amount due on the cheque. Shri Kholkar has next submitted that the cheque exceeded the amount due by the accused and, therefore, the accused was not required to pay the amount due on the said cheque, and in this context, Shri Kholkar has placed reliance on the case of ***Angu P. Textiles (Private) Ltd. & Ors. v. S. R. Company (I)(2002 B.C. 99)***, wherein a single Judge of Madras High Court has held that if the cheque is for an amount higher, then Section 138 of the Act is not attracted. Shri Kholkar has next submitted that the first statutory notice dated 26.02.2002, stood vitiated because of the subsequent notice issued by the Complainant by his letter dated 30.04.2002 and which notice the accused complied inspite of the fact that a notice had otherwise to be of a period of fifteen

days, which the said notice, was not. Shri Kholkar has further submitted that the statutory notice dated 26.02.2002, was not replied to because at that time, the talks were going on. Referring to the Complainant's evidence, Shri Kholkar has submitted that Complainant's assertion that the said letter dated 15.04.2002 was got from him by force could not be accepted since the Complainant did not protest after giving the said letter to the accused. Shri Kholkar submits that the plea of the accused that the talks were going on between the Complainant and the accused can also be gathered from the said letter dated 15.04.2002 itself since the Complainant came with the request as contained in the said letter, with a request to authorize the accused to make the said payment of Rs.1,21,351/- towards sales and luxury tax and payment to the employees.

On the other hand, Shri Usgaonkar, the learned Counsel on behalf of the Complainant, has submitted that this being a revision petition by the accused against two concurrent findings, the scope for interference is limited and relying on the case of the ***State of Orissa v. Nakula Sahu & Ors. (AIR 1979 S.C. 663)*** has submitted that revisional jurisdiction has to be exercised in exceptional cases when there is a glaring defect in procedure or there is a manifest error on a point of law which has consequently

resulted in flagrant miscarriage of justice and that the power being discretionary, it has to be exercised judiciously and not arbitrarily or lightly. Shri Usgaonkar further submitted that the Complainant's case in the light of the presumption available to the Complainant under Section 139 of the Act and other Sections could have been rebutted only by the accused by leading evidence. Shri Usgaonkar, has particularly referred to the letter dated 19.04.2002, wherein on behalf of the accused, it was stated that the Complainant had requested the accused to make the said payments and to deduct the said amount from the amount payable to the accused and if that was so, nothing prevented the accused from sending the balance amount of Rs. 3,78,649/- to the Complainant. Shri Usgaonkar, therefore, submits that any evidence to rebut the presumption had to be given by the accused himself in the light of what is stated in the said letter dated 19.04.2002 and could not have been given by an employee of the accused. Shri Usgaonkar has next submitted that in case an amount of Rs. 1,21,351/- was due by the Complainant to the accused, the debt due on the cheque of Rs.2,50,000/- was still due and payable by the accused to the Complainant. Shri Usgaonkar, therefore submits, that nothing prevented the accused after the said letter dated 15.02.2002 was given by the Complainant to the accused, for the accused to have deducted the said amount of Rs.1,21,351/- and paid

the balance of Rs.3,78,649/-, in case the accused wanted to prove his bonafides. Shri Usgaonkar has also submitted that the Complainant's letter dated 15.04.2002 was immediately withdrawn by the Complainant by letter dated 30.04.2002 even before the same could have been acted upon.

14. In my view, the controversy started between the parties after the Complainant's letter dated 15.04.2002 and its subsequent withdrawal on 30.04.2002, is a controversy which is wholly irrelevant for the purpose of convicting the accused though it may have some relevance for the purpose of sentencing the accused. The controversy relates to subsequent events which took place after the offence under Section 138 of the Act, was completed, upon the failure of the accused to comply with the demand made by the Complainant in his notice dated 26.02.2002. The offence was completed when the accused after receiving the notice on 02.03.2002 failed to comply with the same by making payment before the stipulated time i.e. on or before 17.03.2003. In this context Clause (c) of Section 138 of the Act could be referred to and which provides that before an offence under Section 138 of the Act is said to be committed the drawer of the cheque should fail to make the payment of the amount of money to the payee or, as the case may be, to the holder in due course of the cheque,

within fifteen days of the receipt of the said notice. It is also to be noted that after the failure of the accused to comply with the statutory notice, the Complainant had filed his complaint on 05.04.2002, i.e. even before the Complainant had issued the said letter dated 15.04.2002. The Apex Court in the case of ***Rajneesh Aggarwal v. Amit J. Bhalla (AIR 2001 SC 518)***, has observed that so far as the criminal complaint is concerned, once the offence of dishonour of cheque is committed, any payment made subsequent thereto, will not absolve the accused drawer of the liability of criminal offence, though in the matter of awarding of sentence it may have some effect. The Delhi High Court in the case of ***Jauss Polymers Ltd. & anr.*** **Versus** ***M/s. Sawhnay Brothers*** (2003 (1) DCR 101), has held that if "all the requirements of the ingredients of this Section are fulfilled and satisfied, the offence is complete and trial and punishment of the accused will be perfectly legal and the payment of the amount of the cheque after the institution of the criminal complaint, would not wipe out the offence. For instance, if the amount of the cheque has not been paid by the drawer of the cheque within fifteen days from the date of the receipt of the notice of demand from the payee, offence is complete even if it was paid on the sixteenth day. It is a different question as to what punishment the court will deem proper to be awarded for small abrasion with the requirement of

law or in certain other mitigating circumstances. As far as the present case is concerned, all the necessary ingredients of the offence under Section 138 were completed before the Complainant had presented his complaint on 05.04.2002, after the accused had failed to comply with the statutory notice of the Complainant dated 26.02.2002 by 17.03.2002. The necessary ingredients of Section 138 have been spelt out by the Supreme Court in the case of ***M/s. Kusum Ingots & Alloys Ltd. v. M/s. Pennar Peterson Securities Ltd. & Ors. (AIR 2000 S.C. 954)*** and they are :

> "(i) a person must have drawn a cheque on an account maintained by him in the bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;
>
> (ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;
>
> (iii) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;
>
> (iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque is unpaid;
>
> (v) the drawer of such cheque fails to make payment of the said

> amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice."

The above position is again reiterated by the Apex Court in para 10 of the Judgment in ***K.R. Indira*** **Versus** ***Dr. G. Adinarayana*** (2003) 8 SCC 300. What follows therefrom is that the last ingredient to complete an offence under Section 138 of the Act is (v) above i.e. failure of the accused to make payment within 15 days after service of notice. If payment is made within the said notice period then no offence is committed but in case of failure the offence gets completed. Even if the payment is made on the 16th day the same is not sufficient to come out of the rigours of Section 138 of the Act. In Criminal law, commission of offence is one thing and prosecution is quite another. Commission of offence is governed by Section 138 of the Act. Prosecution is governed by Section 142. One has nothing to do with the other. In this case, the offence by the accused under Section 138 of the Act was committed and completed by the accused in all respects on 17.03.2002 when the accused failed to comply with the statutory notice received on 02.03.02, sent by the Complainant.

15. The Complainant did give the said letter to the accused dated

15.04.2002. The said letter only authorized the accused to make the payment of Rs.1,21,351/- and to deduct the said amount due by the accused to the Complainant against the hotel account. The said letter makes no reference whatsoever to either of the two cheques which had remained unpaid by the accused as on that date. In case the Complainant had in his mind that the said amount of Rs.1,21,351/- was to be adjusted against the said cheques, then the Complainant would have specifically stated so in the said letter. Moreover, the said letter came to be withdrawn even before it could be acted upon by the accused by the Complainant's letter dated 30.04.2002. By no stretch of imagination, it can be said that the letter dated 30.04.2002, is a statutory notice, which was required to be given by the Complainant in terms of Section 138 of the Act. The Complainant had already given such a notice on 26.02.2002 and upon failure on the part of the accused to comply with the same, had even filed the complaint against the accused on 05.04.2002. Therefore, the letter dated 30.04.2002 sent on behalf of the Complainant, by no stretch of imagination can be said to vitiate the notice sent by the Complainant dated 26.02.2002. The letter dated 30.04.2002, was only an attempt on the part of the Complainant to get the amount which had remained unpaid and if possible within two days as stated in the said letter. Even if the accused had

complied with the said letter in time as stipulated by the Complainant it would have had no bearing on conviction since the offence was already completed and a complaint for prosecution was already filed. The case of the Complainant taken even at its worse that the Complainant had owed to the accused the sum of Rs.1,21,351/-, as stated to have been admitted in the said letter dated 15.04.2002, then the accused was still liable to pay to the Complainant atleast the amount of the suit cheque dated 15.02.2002 i.e. Rs.2,50,000/- and the amount of Rs.1,21,351/- could have been set off or adjusted towards other cheque issued by the accused dated 15.03.02 for Rs.2,50,000/- or the accused could have paid the balance which according to him was Rs.3,78,649/- as against the sum of Rs. 5,00,000/- which the accused owed to the Complainant.

16. Once the offence was committed by the accused on 17.03.2002 subsequent events which took place between the Complainant and the accused could at the most be taken as mitigating circumstances in favour of the accused for the purpose of sentence, and nothing more and certainly they could not have been taken to contend that there was no legally enforceable debt payable by the accused to the Complainant or to say that no offence was committed by the accused. If there was no liability, once the

liability was to the extent of Rs. 3,78,649/- only, then the accused would have certainly not ventured to send to the Complainant a demand draft in the sum of Rs.5,00,000/- with his letter dated 04.05.2002. The accused paid the entire amount subsequently in Court as already noted, and both the Courts below have taken these subsequent events into consideration in awarding lesser sentence to the accused.

17. In view of the above, I find that there is no merit in this revision and consequently the same is hereby dismissed.

N. A. BRITTO, J.

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